

Case No. 67315-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CATHERINE LAKEY, a single woman; GERTHA RICHARDS, a single woman; MICHAEL HESLOP, a single man; TROY FREEMAN and CAROLINA AYALA de FREEMAN, husband and wife; PATRICK McCLUSKY and MICHELLE McCLUSKY, husband and wife; SHAHNAZ BHUIYAN and ANN RAHMAN, husband and wife; STEVEN RYAN and NORA RYAN, husband and wife; KEVIN CORBETT and MARGARET CORBETT, husband and wife; KATHRYN McGIFFORD, a single woman; and JACQUELYN MILLER, a single woman,

Appellants,

v.

PUGET SOUND ENERGY INC., a Washington corporation; and CITY OF KIRKLAND, a Washington municipal corporation,

Respondents.

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APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

This appeal involves two sets of claims. The first involved nuisance and trespass claims asserted by Appellants against Respondent Puget Sound Energy, Inc. (“PSE”). Following a *Frye* hearing, Appellants’ claims against PSE were dismissed in a “Summary Decision.” (CP 1418-1422). This appeal concerns only the dismissal of the nuisance claim.

The second claim was an inverse condemnation claim asserted by Appellants against the City of Kirkland (“City”).

Both sets of claims have their genesis in the decision by the City to grant PSE variances for the construction of a substation immediately adjacent to the homes owned by Appellants (the “Substation”). Although the claims had their genesis with an action by City, the factual and legal issues are otherwise discrete and will be discussed separately starting with a Reply to PSE.

II. REPLY AS TO PUGET SOUND ENERGY INC.

A. The Standard for Nuisance Liability.

From Appellants’ perspective, the first task should be to identify the standard governing nuisance liability under the circumstances here – what is it that a plaintiff has to prove. The discussion of the proof should follow the discussion of what needs to be proven. The Trial Court never enunciated a standard in dismissing Appellants’ nuisance claim.

PSE’s conception of the appropriate legal standard does not derive from Washington law. It is taken from *San Diego Gas & Electric Co. v. Superior Court*, 920 P.2d 669, 55 Cal. Rptr. 2d 724 (1996). While that case is distinguishable at multiple levels, one aspect clearly renders that case

inapplicable here – California has a different standard for nuisance liability: “The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant’s conduct.” *Id.* at 752. The social utility of a defendant’s conduct has never been identified as part of Washington’s test for nuisance liability.

PSE cites *Cook v. Rockwell Intern. Corp.*, 618 F. 3d 1127 (10th Cir. 2010), for the proposition that: “A scientifically unfounded risk cannot rise to the level of an unreasonable and substantial interference.” (*Response at p. 48*). But, consistent with the Washington cases cited by Appellants, *Cook* explicitly recognizes a cause of action for nuisance arising from an apprehension of injury:

To the extent Plaintiffs rely on anxiety from an increased risk to their health as an interference with the use and enjoyment of their properties, that anxiety must arise from scientifically verifiable evidence regarding the risk and cannot be wholly irrational... [T]he Colorado Supreme Court would not permit recovery premised on a finding that an interference, in the form of anxiety or fear of health risks, is “substantial” and “unreasonable” unless that anxiety is supported by *some* scientific evidence.

At 1145-1146 (applying Colo. law; *emphasis added*). *Cook* specifically and expressly recognizes that apprehension/fear of injury can be a nuisance where the fear is not wholly irrational because it is supported by *some* scientific evidence. The Court did not say “proven to a medical certainty” or that the evidence supporting the fear has to be unequivocal. Nor, does the Court say all the evidence must support the fear.

The standard enunciated in *Cook* appears to be the functional equivalent of the standard enunciated in the Washington cases by

Appellants. A rational fear supported by some scientific evidence does not differ significantly from an apprehension having a reasonable basis. In each case, the only requirement is that there be some objective evidence behind the apprehension. So, is there some scientific evidence from which an apprehension could arise?

B. The Scientific Evidence.

The evidence relating to health risks from electromagnetic fields (“EMF”) is not unequivocal or definitive. But, the standard for liability does not say it has to be. The Environmental Protection Agency (“EPA”) makes available a publication which states that a “*definitive* cause-effect relationship” between EMF and human disease cannot be confirmed *or refuted*. (*Hearing Ex. 16 at p. 1; emphasis in original*). In other words, there is some evidence that supports a health risk and some that does not.

The scientific evidence that Appellants have placed in the record that supports a health risk consists of epidemiological studies. Epidemiological studies have been recognized as valid evidence of a causal relationship between exposure to a toxic agent and human disease. Indeed, the protocol developed by the International Agency for Research on Cancer, a sub entity of the World Health Organization (“WHO/IARC”) for evaluating potential carcinogens places primary emphasis on epidemiological data in the evaluation of carcinogenicity. (*Hearing Ex. 4 at pp. 8-12*).¹ As discussed below, the WHO/IARC considers it valid to

¹ The results of a review of WHO/IARC literature on the carcinogenic risk of a potential carcinogen are reported in “Monographs.” The WHO/IARC Monograph on EMF is No. 80 and was Hearing Exhibit 5.

characterize a substance as carcinogenic even where there is no toxicological (mechanism or animal study) data supporting carcinogenicity.

PSE claims that the opinions of Appellants' expert Dr. David O. Carpenter's that a statistically-significant association between a suspected carcinogen and disease is enough to show causation is outside the mainstream. PSE cites to the testimony of its expert Dr. Nancy Lee that "it is a big mistake to equate a statistically significant relationship with causality..." (*Response at p. 37*). The Trial Court concluded "epidemiologists do not and should not equate a statistically significant association to causation." (*CP 1421*).

The problem with the Trial Court's conclusion is that it flies in the face of case law. Epidemiological studies are well recognized by Courts as evidence of causation: *In re Silicon Breast Implant Litigation*, 318 F.Supp. 879 at 892-893 (C.D. Cal 2004) ("they assume a very important role in determinations of questions of causation"); *see, also, Deluca by Deluca v. Merrill Dow, Inc.*, 911 F.2d 941 (C.A. 3rd Cir. 1990). Establishing causality is exactly the purpose for which the WHO/IARC uses a statistical association. Under the heading "Criteria for Causality" of Hearing Exhibit 4, it states: "A strong association (e.g. relatively large risk) is more likely to indicate causality than a weak association..." (*Hearing Ex. 4 at 11:29-30*).

The body of epidemiological research relied upon by Appellants is identified in part at pages 22 through 28 of Appellants' Opening Brief. These materials include original research papers and three pooled analyses: Ahlbom *et al.*, (2000) (*CP 1110-1116*); Greenland *et al.*, (2000) (*CP 247-*

257) and Kheifits and Ahlbom, (2000) (CP 1118-1125). These pooled analyses combine the data from 20+ published studies in more than a dozen countries over a period of more than 20 years. The WHO/IARC identifies pooled analyses as an appropriate, as well as an “advantageous,” form of epidemiological analysis. (*Hearing Ex. 4 at p. 10.*)

As noted in Hearing Exhibit 4, the WHO/IARC has very stringent standards for scientific literature to be relied upon in examining the carcinogenicity of a possible carcinogen. The literature must be peer reviewed (*Hearing Ex. 4 at p. 4*) and meet stringent quality standards (*Hearing Ex. 4 at pp. 9-10*). Appellants’ expert Dr. De-Kun Li’s study of EMF exposure and miscarriage (*Hearing Ex. 21*), characterized as “pseudoscience” by PSE, is one of the references in WHO/IARC Monograph No. 80 on EMF (2002), as well as the following relied on by Appellants: Wertheimer-Leeper (CP 318-329), Savitz *et al.* (CP 331-348), and Feychting-Ahlbom (CP 350-364) and the two pooled analyses Ahlbom *et al.*, (2000) (CP 1110-1116); and Greenland *et al.*, (2000) (CP 247-257).

Certainly there are uncertainties associated with the health risk posed by EMF. One of the uncertainties that PSE has consistently pointed to is the lack of a documented mechanism whereby EMF induces human disease. Relying upon the testimony of PSE’s expert Dr. Mark Israel, PSE has specifically challenged Dr. Carpenter’s testimony on the basis that an opinion that an agent is carcinogenic cannot be made without an identified mechanism.

As Dr. Li, the co-author of several studies on the health risks of EMF exposure, testified:

The lack of a well-established underlying mechanism by which EMF induces adverse health effect should not be used as an argument against the existence of adverse EMF health risk. The adverse health risk of many environmental exposures was established well before the underlying mechanisms were understood. For example, more than a half century after establishing the causal relationship between cigarette smoking and lung cancer, scientists are still trying to figure out exactly how smoking causes lung cancer.

(*CP 421 at 4:10-15*). Dr. Li's testimony is consistent with the approach taken by the WHO/IARC:

Some epidemiological and experimental studies indicate that different agents may act at different stages in the carcinogenic process, and several different mechanisms may be involved. The aim of the *Monographs* has been, from their inception, to evaluate evidence of carcinogenicity at any stage in the carcinogenesis process, independently of the underlying mechanisms.

(*Hearing Ex. 4 at 2:33-37*). In other words, an agent can be identified as carcinogenic on the basis of epidemiological evidence *without* an identified mechanism whereby the agent causes cancer. So, if Dr. Carpenter's opinion on this issue is outside the mainstream, so is the WHO/IARC.

Another uncertainty is the lack of animal studies showing a correlation between EMF exposure and human health risks. Washington law does not require animal studies as evidence of cause and effect (*see Intalco Aluminum*, 66 Wn. App. at 661-62, 833 P.2d 390). Expert opinions based upon animal data have been excluded where the expert did not establish that the test animal represented a valid basis for extrapolating animal results to human. *See Richardson v. Richardson-Merrell, Inc.*,

857 F.2d 823, 830 (D.C.Cir.1988), *cert. denied*, 493 U.S. 882, 110 S.Ct. 218, 107 L.Ed.2d 171 (1989).

Additionally, among the reasons the Trial Court rejected Dr. Carpenter's opinions, was testimony by Dr. Israel that proof of causation requires: "animal studies, known mechanisms, and reproducibility of the results." (CP 1422). Animal studies and mechanisms are not necessary to the characterization of an agent as carcinogenic according to the WHO/IARC. (Hearing Ex. 4 at 12). In specific, the WHO/IARC notes that the fact that most carcinogens cause cancer in both humans and animals "cannot establish that all agents that cause cancer in experimental animals also cause cancer in humans." (Hearing Ex. 4 at 12:31-32). The converse would be equally true – an agent that causes cancer in humans may not necessarily cause cancer in experimental animals. Again, if Dr. Carpenter's opinion on this issue is outside the mainstream, so is the IARC.

With respect to "reproducibility of results," Dr. Leeka Kheifits was the lead scientist involved in the WHO/IARC Monograph 80. Dr. Kheifets has written that epidemiological studies, including the pooled analyses, are the principal basis for the characterization of EMF exposure as *possibly carcinogenic* by the WHO/IARC:

Thus, largely on the basis of epidemiological association of residential magnetic field exposure and childhood leukaemia, the International Agency for Research on Cancer [an arm of the WHO] has classified extremely low-frequency magnetic field exposure as being possibly carcinogenic to humans.

(CP 1118).

In 2010, Dr. Kheifets and Dr. Anders Ahlbom, among others, published the results of another pooled analysis based on peer-reviewed epidemiological research published after 2000, essentially an update of the two prior pooled analyses based on more recent data. (*CP 1118-1125*). This pooled analysis includes epidemiological research by Draper in Great Britain (*CP 294-298*), Kabuto in Japan (*CP 285-292*) and Lowenthal in Tasmania (*CP 300-305*). The conclusion in this pooled analysis is the same as in the prior two: “[T]hat recent studies on magnetic fields and childhood leukaemia do not alter the previous assessment that magnetic fields are possibly carcinogenic [to humans].” (*CP 1118*). In other words, the results achieved in the earlier pooled analyses were reproduced in a further pooled analysis based on subsequent additional research.

C. Rational/Reasonable Apprehension.

If the fundamental issue here is whether a person of ordinary intelligence would have a rational/reasonable apprehension of EMF, then the sources of information readily available to the general public should be relevant to the reasonableness of that apprehension. That hypothetical person is not going to call Drs. Lee, Li, Israel or Carpenter when faced with this issue. Google and various organizations charged with protecting public health are the sources from which information would be sought.²

Those organizations have relied on exactly the same body of epidemiological research to advise the public that the way to limit risk is to minimize exposure to EMF. These organizations include the WHO, the

² Appellants invite the Court to make an internet search using the search term “health risks of electromagnetic fields.”

California Department of Health Services (“CDHS”), the U.S. Center for Disease Control (“CDC”) and the EPA. The WHO/IARC characterized EMF as a possible carcinogen in 2002. (CP 887). A 2002 report on EMF exposure from the CDHS concludes:

To one degree or another, all three of the [C]DHS scientists are inclined to believe that EMFs can cause some degree of increased risk of childhood leukemia, adult brain cancer, Lou Gehrig’s Disease, and miscarriage.

(CP 274). A publication currently available from the CDC states:

Many studies report small increases in the rate of leukemia or brain cancer in groups of *people living or working in high magnetic fields*. Other studies have found no such increases. The most important data come from six recent studies of workers wearing EMF monitors to measure magnetic fields. All but one study found significantly higher cancer rates for men with average workday exposures above 4 milligauss. However, the results of these studies disagree in important ways such as the type of cancer associated with EMF exposures. So scientists cannot be sure whether the increased risks are caused by EMFs or by other factors. A few preliminary studies have also associated workplace EMFs with breast cancer, and one study has reported a possible link between occupational EMF exposure and Alzheimer[*]s disease.

(Hearing Ex. 15 at p. 3; *emphasis added*).

The CDHS report, for example, concludes:

[T]o put things in perspective, individual decisions about things *like buying a house* or choosing a jogging route should involve the consideration of certain risks, such as those from traffic, fire, flood, and crime, as well as the uncertain comparable risks from EMFs.

(CP 275; *emphasis added*).

The EPA makes available a publication which states that a “*definitive cause-effect relationship*” between EMF and human disease

cannot be confirmed *or refuted*. (*Hearing Ex. 16 at p. 1; emphasis in original*). The publication goes on to recommend that:

People concerned about possible health risks from power lines can reduce their exposure by:

Increasing the distance between you and the source –

The greater the distance between you and the power lines the more you reduce your exposure.

Limiting the time spent around the source – Limit the time you spend near power lines to reduce your exposure.

(*Hearing Ex. 16 at p. 2; emphasis in original*). Most notably, what the EPA does not say is that there is nothing to be concerned about from EMF exposure. The EPA certainly does not say that a fear of EMF exposure would be irrational. When the government is making these kinds of pronouncements, can it really be said that an apprehension of injury from EMF is unreasonable or irrational?

PSE asserts that Appellants “relied solely on the testimony of Dr. Carpenter” to establish a reasonable apprehension. (*Response at p. 24*). That assertion is nonsense. Based on the mass of evidence in the record wholly separate from Dr. Carpenter, a finder of fact clearly could conclude that an apprehension of EMF exposure is rational/reasonable. This was an issue of fact for a finder of fact, irrespective of whether Dr. Carpenter’s testimony was admissible.

D. PSE’s Assertion that the Issue has been Fully Decided.

PSE’s opening statement of its position is: “Since the 1990s, courts have rejected EMF-based claims for lack of scientific support.” (*Response at p. 1*). It is unclear what legal significance is to be attached to that statement. That statement would be significantly more accurate if it read:

“Prior to the bulk of the currently-available epidemiological data, Courts in the first half of the 1990’s rejected EMF based claims.”

The newest case involving anything remotely related to a nuisance claim cited by PSE was decided in 1996. San Diego Gas & Elec. , described by PSE as involving a comprehensive and painstaking discussion of scientific, regulatory and legal issues was decided in 1996. Jordan and Borenkind were decided in 1995. As such, these cases predate most of the epidemiological research drawing a correlation between EMF exposure and human disease.

The statement that “have rejected EMF-based claims for lack of scientific support” is literally not true. In Houston Lighting and Power Co. v. School District, 739 SW 2d 508 at 516 (Tex. 1987), a condemnation case, testimony was admitted into evidence on the issue of whether EMF was a possible cause of childhood leukemia:

Dr. Nancy Wertheimer, an epidemiologist, testified about the studies she and others have conducted which show correlations between power lines and cancer. Her study of childhood cancer concluded that children who lived near wires that put out current and have magnetic fields were two or three times more apt to have cancer than children who did not. She stated that the data strongly suggests that long-term exposure is an important element.

Texas is one of the jurisdictions that requires the public apprehension causing a decrease in value to be objectively reasonable:

Based on this evidence the jury could have believed that the transmission lines posed a risk to the children and that the uncertainty over the magnitude of that risk should dictate caution.

Id. at 518. In Fla. Power & Light Co. v. Jennings, 518 So.2d 895 (Fla. 1987), the same rule was adopted in another condemnation case based on EMF exposure:

Under this rule, evidence of the existence of fear and its effect on market value may be admitted into evidence as a factor or circumstance to be considered by the trier of fact in a property valuation proceeding, *so long as it is shown that the fear has a reasonable basis.*

Id. at 897 (*emphasis added*).

Most recently, the Court in Ogle v. Ohio Power Co., 180 Ohio App.3d 44, 903 N.E.2d 1284 (2008), reversed the dismissal of a nuisance claim based on health risks from power lines:

The Ogles' complaint alleged that Ohio Power intended to construct the telecommunications tower in such a location as to be "visible" from their property and to be "close enough" to their property as to create "health risks" to them and their animals. And, they alleged that the tower will cause diminution in the fair-market value of their home and will pose a substantial threat of damage to their persons and property. They concluded that the proposed tower would constitute a "nuisance" and an "unreasonable interference with their rights." Given these allegations, we believe that the Ogles generally alleged a "nuisance" claim against Ohio Power and Cline based on their claims that the location, size, and appearance of the proposed telecommunications tower would create a risk of physical harm and cause diminution in the fair-market value of their property.

In any case, the simple fact that the cases relied on by PSE predate the vast bulk of the evidence relating to the health risks of EMF exposure should be sufficient to reject this argument.

E. Public v. Private Decision Making.

PSE asserts that the fact that no regulatory authority has set an exposure level even close to the exposure levels reported as resulting in increased incidence of disease is dispositive. PSE offers no rationale as to why actions by a regulatory body would be relevant to private decision making.

The issue here is not what constitutes prudent regulation in the public interest, but whether it is reasonable for private individuals to avoid exposure to EMF. As previously noted, Dr. Li has testified: “scientists are still trying to figure out exactly how smoking causes lung cancer.” (CP 421 at 4:14-15). In 1969, Congress adopted the Public Health Cigarette Smoking Act, Pub.L. now 15 U.S.C. §§ 1331-1340 which required the following warning to be placed on cigarette packages: “WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH.”

This warning does not quantify the risk, but suggests that a concerned citizen can minimize the health risk by avoiding smoking. This is not particularly different from the CDHS saying:

[T]o put things in perspective, individual decisions about things *like buying a house* or choosing a jogging route should involve the consideration of certain risks, such as those from traffic, fire, flood, and crime, as well as the uncertain comparable risks from EMFs.

(CP 275; *emphasis added*).

It took Washington State until 2005 to adopt a statute regulating exposure to second hand smoke: *see*, RCW 7.160.175. Would it have been unreasonable prior to 2005 for someone to have been apprehensive of

exposure to cigarette smoke? The fact that EMF is not regulated at the field strengths which the epidemiological data indicates are harmful is meaningless to the nuisance issue.

F. RCW 7.48.160 Does Not Preclude a Nuisance Claim.

PSE was not directed or required by the Washington Utilities and Transportation Commission (“WUTC”) or any other governmental authority to locate the Substation adjacent to Appellants’ homes. So, while the operation of the Substation at 60 Hz may have been mandated by the WUTC, no “authority under a statute” mandated that the Substation be placed where it was placed. Indeed, applicable regulations would have precluded the Substation from being constructed in its current location had PSE not sought and received variances from the City.

PSE’s contention is based on a misinterpretation of the statute. Even activities conducted under the express authority of a statute can still be a nuisance if conducted in a manner that unreasonably interferes with adjacent a property owner’s rights:

The Court of Appeals would foreclose Grundy’s public nuisance claim because “[n]othing which is done or maintained under the express authority of a statute, can be deemed a nuisance.” RCW 7.48.160. But a lawful action may still be a nuisance:

When a nuisance actually exists, it is not excused by the fact that it arises from a business or erection which is of itself lawful; and, even though an act or a structure was lawful when made or erected, if for any reason it later becomes or causes a nuisance, the legitimate character of its origin does not justify its continuance as a nuisance.

66 C.J.S. *Nuisances* § 15, at 551-52 (1998) (footnote omitted). “[A] ‘fair test as to whether a business lawful in itself, or a particular use of property, constitutes a nuisance,

is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case’.” Powell v. Superior Portland Cement, 15 Wn.2d 14, 19, 129 P.2d 536 (1942) (quoting 46 C.J. Nuisances § 20 (1928)). “The fact a governmental authority tolerates a nuisance is not a defense if the nuisance injures adjoining property.” Tiegs v. Watts, 135 Wn.2d 1, 15, 954 P.2d 877 (1998).

Grundy, 155 Wn.2d at 6-7 F.N. 5, a case relied on by PSE. *See, also*, Bruskland v. Oak Theater, Inc., 42 Wn.2d 346 at 350-351, 254 P.2d 1035 (1953). So, activity otherwise protected under RCW 7.48.160 can still be a nuisance if it unreasonably interferes with the use and enjoyment of property by other property owners.

Beal, 228 P.2d 538, an Oklahoma case cited by PSE, does not compel a different result. Among other things, the Oklahoma statute has been construed to be applicable *only* to claims for injunctive relief – not claims for damages. B.H. v. Gold Fields Mining Co., 506 F. Supp. 792 (Okla. 2007). It is known from the reported Beal decision that a “public nuisance” claim was dismissed under the Oklahoma statute in a different and unavailable decision. Why the unavailable case was dismissed **is not disclosed**.

G. Electromagnetic Field Strengths.

PSE devotes a significant amount of discussion to “ubiquitous” EMF and ambient field strengths without explaining exactly which issue in this case to which this information is relevant. It is, in fact, PSE’s discussion is irrelevant for a number of reasons.

First, it is undisputed that the devaluation of Appellants’ homes because of “electromagnetic issues” and “associated nuisances/stigmas;”

(CP 410) was triggered by the construction of this very large Substation in very close proximity to Appellants' homes. The issue here is whether a reasonable person would have an apprehension of EMF exposure from living next to this Substation.

Second, the issue here is not field strength but rather exposure. Think about sunburns – the intensity of the solar radiation does not by itself cause sunburn, rather it is the cumulative dose of solar radiation over time. PSE does not discuss the exposure issue. However, exposure does appear in the literature.

There are a number of studies in the record that examine rates of childhood leukemia in the general population to the rate in children living in close proximity to power transmission lines and facilities where increased EMF exposure is present. See Feychting and Ahlbom (1993) (CP 350-364); Tynes and Haldorsen (1996) (CP 597-604); Draper, *et al.* (2005) (CP 294-298); Kabuto, *et al.* (2005) (CP 285-292); and Lowenthal (2007) (CP300-305). Each study found a statistically-significant elevation in leukemia rates in children residing in close proximity to power lines.³

The issue is also touched on in the CDC publication:

Many studies report small increases in the rate of leukemia or brain cancer in groups of people *living or working in high magnetic fields*. Other studies have found no such increases. The most important data come from six recent studies of workers wearing EMF monitors to measure magnetic fields. All but one study found significantly higher cancer rates for men with average workday exposures above 4 milligauss.

³ If EMF is a disease-causing agent, because it is ubiquitous, some portion of disease in the general population will be attributable to EMF. The basal rate in the general population does not, therefore, represent a true unexposed population.

(*Hearing Ex. 15 at p. 3; emphasis added*). The issue of total exposure from the substation, if relevant, is not addressed in the evidence.

H. Conclusion as to Puget Sound Energy Inc.

The *Frye* issues have already been addressed in Appellants' Opening Brief. Dr. Carpenter's testimony was rejected – not because his methodologies were not generally accepted – but because his opinions diverged from those of PSE's experts. Following the same kind of protocol as the WHO/IARC, Dr. Carpenter conducted a literature review to form his opinion on the health risks of EMF. Dr. Carpenter limited his review to peer-reviewed publications and rejected those studies where he concluded the study methodologies were not proper. Dr. Carpenter relied on the epidemiological data to conclude that EMF was a human health risk notwithstanding the lack of toxicological data.

However, whether or not Dr. Carpenter's testimony is admitted, the fact of the matter is that the record here contained a multitude of original research sufficient to justify a reasonable apprehension of health risks from EMF exposure. For that reason, the Trial Court should not have dismissed Appellants' nuisance claim.

III. REPLY AS TO THE CITY OF KIRKLAND

A. The Conduct of the City of Kirkland in Approving Construction of the Substation was a Taking.

The City's basic position here is the same as it asserted before the Trial Court: "Under Washington law, the mere issuance of a valid land use decision, without more, does not meet the required elements of an inverse condemnation claim." (*CP 1569:38-1570:3*). This may be an accurate

statement, but the City's conduct here was not simply the issuance of a valid land use permit.

In *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998), the principal case cited by the City on this issue, the plaintiffs sought to recover damages as a result of the failure of a drainage system on an adjacent residential development approved by King County. The critical facts in the case were that the County does not participate in the design process:

King County does not prepare or revise engineering drawings of the developer but reviews them for compliance with the codes and regulations that are in effect when the completed application is submitted.

Id. at 951. Ultimately, what the *Phillips* Court held is that, because the drainage system was approved pursuant to existing regulations, there was no appropriation of private rights:

If all that the County had done was to approve private development, then one of the elements of an inverse condemnation claim, that the government has damaged the Phillips' property for a public purpose, would be missing. *There is no public aspect when the County's only action is to approve a private development under then-existing regulations.*

Id. at 960-961 (*emphasis added*). This issue of whether the Substation was permitted under existing regulations is, in fact, the key issue.

In this regard, it is undisputed that in order to construct the Substation, PSE had to obtain variances from the City.

Because of the configuration of the Subject Property, PSE applied to the City for a variance to construct the new substation. Hearing Examiner's Decision, pp. 2, 3 & 9,

Findings of Fact Nos. 1 & 10; Conclusion No. 8. PSE sought a variance from the City with respect to setbacks, landscape buffering and maximum height. *Id.*, p.1.

(*CP 1568:1-8*). As stated in the Washington Practice Manual on Real Estate:

Whereas a conditional use is a permitted use, one listed in the zoning ordinance as permitted upon a special permit, a variance permit allows the applicant to do something the zoning ordinance would otherwise forbid.

17 Wash. Prac., Real Estate § 4.25 (2d ed.). *See, also*, 83 Am. Jur. 2d Zoning and Planning § 755. The granting of a variance is not “an approval under existing regulations.” By definition, it is an exception from existing regulations granted for the benefit of a single private party.

The simple, undisputed and entirely dispositive fact of the matter is that the existing regulations *did not allow* PSE to construct what PSE ultimately obtained authority from the City to construct. The City was not exercising any general regulatory authority or, as in *Phillips*, confirming that the Substation complied with existing regulations. The City’s requirement of variances is an indisputable admission that the Substation did not comply with existing regulations. To the extent the City relied on *Phillips*, its Summary Judgment Motion was simply without merit.

Pierce v. Northeast Lake Washington Sewer & Water District, 69 Wn. App. 76, 847 P.2d 932 (1994), is equally unhelpful to the City. The taking claim in *Pierce* was based on the grant of a conditional use permit: “Despite an initial denial by the zoning adjuster, the District was ultimately granted a conditional use permit in August 1985 for the construction of a 4.3–million gallon water storage tank.” *Id.* at 78. As noted above, a

conditional use permit is a permitted use with the effect that the approval in Pierce involved no change in applicable regulations.

Moreover, the actual basis for decision in Pierce is distinguishable from this case. The plaintiffs in Pierce asserted that their property values had been diminished because a water tank obscured their view. The claim was rejected on the following basis: “Because the Pierces allege no easement of light, air or view over the District’s property, they cannot recover damages attributable to view loss in an inverse condemnation action.” Id. at 81. A “taking” occurs when government conduct interferes with the use and enjoyment of private property, with a subsequent decline in market value. Lambier v. City of Kennewick, 56 Wn. App. 275, 279, 783 P.2d 596 (1989), *review denied*, 114 Wn.2d 1016 (1990). Because the plaintiffs had no property right in the adjacent property, there was no interference with plaintiff’s private property.

B. The Public v. Private Use Issue.

The City Staff’s Conclusions and Recommendations to the Hearing Examiner on PSE’s application state that granting the variances:

[I]s consistent with the public health, safety and welfare because it will allow a **Public Utility** Use to replace an existing substation with a new substation that will increase electrical service capacity and improve reliability, benefiting property owners and electrical customers.

(*CP 1537; emphasis added*). So, the City’s intent was to increase PSE’s service capacity available to the City’s residents. It is actually not entirely clear that this is a private use.

In Neitzel v. Spokane Intern. Ry. Co., 65 Wash. 100, 117 P. 864 (1911), the railroad company condemned a right-of-way which was later

leased to a grocery company. Because the grocery company had no mandate to service the public, it was contended that the right-of-way should revert to the condemnee because the use had become private. The Court discussed the distinction as follows:

In deciding whether any particular use to which property may be devoted is public or private, courts must look, not only to the character of the business to be transacted, but also to the duties which the law imposes upon those who are to conduct the same. If the public benefit is merely incidental, and the use is optional with the owner, it will not be a public use, authorizing an exercise of the power of eminent domain. There must be a general public right to a definite use of the property, as distinguished from a use by a private individual or corporation which may prove beneficial or profitable to some portion of the public.

Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 13 P.3d 183 (2000), has an extensive discussion of the same issue.

Under this authority, a municipality, such as the City, could exercise its power of eminent domain for the benefit of a private utility *if* the services of that utility were available to the public as a matter of right. While a private company, PSE is obligated to provide service to members of the public generally. *See* RCW 80.28.110:

Every...electrical company...engaged in the sale and distribution of...electricity..., shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto, suitable facilities for furnishing and furnish all electricity...as demanded, ...

If the City's action involved a public use, there is no question that there has been an inverse condemnation.

C. LUPA and the Remedies Issue.

RCW 36.70C.040 provides:

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(c) Claims provided by any law for monetary damages or compensation.

So, a party aggrieved by a land use decision has one of two choices: (1) judicial review under LUPA, or (2) a claim for monetary damages or compensation outside LUPA.

So, what are the possible outcomes of “judicial review?” The relief the Court can grant under LUPA is set forth in RCW 36.70C.140:

The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.

If the aggrieved party loses the appeal, the land use decision stands. If the aggrieved party wins, the remedy involved in Option 1 is invalidation or modification of the land use decision. The bases for invalidation or modification can include that: “The land use decision violates the constitutional rights of the party seeking relief;” RCW 36.70C.130(1)(f), but monetary relief or “compensation is not available under LUPA.

RCW 36.70C.040 allows a party to combine a claim for damages/compensation with judicial review of a land use decision, but it is not mandatory. The statute recognizes that a land use regulation could be a valid regulation which, nevertheless, gives rise to a right to compensation. So, the remedies are not mutually exclusive.

Thus, there isn't any mystery about the statutory scheme. If what the aggrieved party wants is to be relieved of the land use decision, the LUPA process must be followed. But, if aggrieved party doesn't care about invalidating or modifying the land use decision and only wants is money because of the impact of the decision, LUPA does not require the LUPA process to be filed. In a sense, LUPA mandates an election of remedies to the extent the aggrieved party wants is to be relieved of the land use decision.

Mercer Island Citizens for Fair Process v. Tent City 4, 156 Wn. App. 393, 232 P.3d 1163 (2010),⁴ and *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000), are really inapplicable here because the relief sought in each case was invalidation of the land use regulation and not money damages. That relief could only be obtained through LUPA. In citing to these cases, the City is confusing the property owners' election to pursue invalidation of the land use decision under LUPA as a remedy with a limitation of remedies that would preclude the property owners from seeking monetary damages.

⁴ *Mercer Island* appears to conflict with prior decision in *Cox v. Lynnwood*, 72 Wn. App. 1 (1993), that a plaintiff does not need to pursue a state court remedy for due process violations before asserting claims under 42 U.S.C. 1983.

So, what are the vehicles by which an aggrieved landowner can seek damages/compensation? The typical vehicle available to Appellants would be an inverse condemnation claim. With respect to an inverse condemnation claim, the City still has yet to offer a cogent explanation as to why the term compensation means something different when it is used in the exception to the application of LUPA than when used in the State Constitution.

The City acknowledges that if it appropriated Appellants' property, it violated the State Constitution and, because it violated the State Constitution, Appellants' have no remedy. (*Response at pp. 8-9*). This is, in truth, a ridiculous argument for two reasons. First, it allows the City to benefit from what it admits would be illegal conduct.

A violation of the State Constitution is inherent in every inverse condemnation claim because it is an element of the claim that the governmental entity has not paid just compensation. So, it is not a violation of the State Constitution per se which would deprive Appellants of the remedy. Rather, according to the City, Appellants should be deprived of a remedy because the City's conduct involved multiple constitutional violations; once by not paying just compensation and once by appropriating property for a private use.

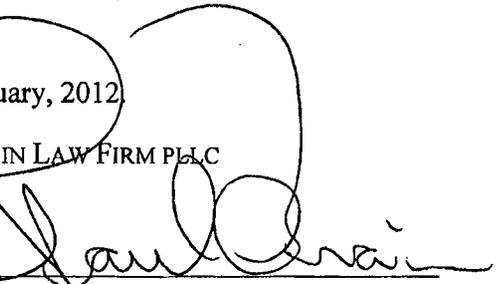
This is again where *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000), comes into play. The specific reason given by the Court in this case for invalidating the regulation was that the land use regulation was not a public use. So, the fact that appropriation is not for a public use is an affirmative defense to an

eminent domain proceeding, or a basis for invalidating a regulation affecting private landowners. But, there is no authority in this state holding that a governmental entity can assert that an appropriation was for a private use as an affirmative defense to an inverse condemnation claim.

What if the property owner, for whatever reason, does not want to challenge the appropriation but just wants just compensation? Or, as here, the appropriation has already taken place? The State Constitution provides: "No private property shall be taken or damaged for public or private property without just compensation having been first made, ..." Putting aside whether the fact that an appropriation for private use could be used to prevent the appropriation, there is no other way to reads this provision other than that if the property has already been taken, just compensation is required to be paid.

DATED this 25th day of February, 2012

BRAIN LAW FIRM PLLC

By: 

Paul E. Brain, WSBA #13438

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of February, 2012, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

Counsel for Respondent Puget Sound Energy Inc.:

Jeffrey M. Thomas	<input type="checkbox"/>	Hand Delivery
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of February, 2012, at Tacoma, Washington.

